MOTION FILED
MAR 26 1984

NO. 83-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI AND MARY TATRO, Individually,
and as Next Friend of AMBER TATRO,
a Minor,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The New Jersey Department of the Public Advocate 1/ (hereinafter Department) respectfully moves this Court for leave to file the attached brief as amicus curiae in this case. The consent of the petitioner school district was requested but refused; respondents, however, consented to filing.

The Department provides legal representation to protect and advocate the rights of the developmentally disabled and other handicapped persons through its Division of Advocacy for the Developmentally Disabled 2/ (hereinafter DADD). In addition, DADD is

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1. The Department, a cabinet level agency of New Jersey state government, N.J.S.A. 52:27E-2, is empowered to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest" N.J.S.A. 52:27E-29.

2. DADD is vested with a state mandate to provide legal representation and other advocacy services to protect the rights of developmentally disabled persons and other handicapped persons found to have needs similar to the developmentally disabled. N.J.S.A. 52:27E-41.4.

designated to protect and advocate the rights of developmentally disabled persons pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 et seq. DADD has participated in various proceedings involving the rights of the developmentally disabled relating to special education, 3/ medical treatment, 4/ and community

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3. The Department, through DADD, has assisted hundreds of children in administrative and judicial reviews of the adequacy of special education programs pursuant to N.J.S.A. 18A: 46-1 et seq. See, e.g., East Windsor Bd. of Ed. v. Diamond, No. 83-2364 (D. N.J. 1983); Wall Twp. Bd. of Ed. v. Watts, No. 83-4972 (D. N.J. 1983); and Bd. of Ed. of City of Paterson v. City Council of Paterson, No. L-03814-81 (N.J. Super. Ct., Law Div. 1982).

4. The Department joined an amicus brief before this Court in Pennhurst State School v. Halderman, 451 U.S. 1 (1981). See also, the Public Advocate's participation as party intervenor in In the Matter of Claire C. Conroy, 188 N.J. Super. 523 (Chan. Div.), rev'd 190 N.J. Super. 453, cert. granted __ N.J. __ (1983); In the Matter of Lee Ann Grady, 85 N.J. 235, 426 A. 2d 467 (1981), and as amicus curiae in State of N.J. v. Levine, 84 N.J. 234, 418 A. 2d 229 (1980).

residences. 5/

The interest of the Department in this case arises from its frequent experience with special education and other issues affecting the developmentally disabled citizen of the State of New Jersey, its federal and state mandate to protect the rights of the developmentally disabled people in this State, including the right to a free, appropriate public education to respondent Amber Tatro and many of the other handicapped children who stand to be affected by the outcome of this case. 42 U.S.C. §6001 (7); N.J.S.A. 52:27E-44.3; N.J.S.A. 30:6D-3.

The Department appears as amicus curiae 6/ to address several fundamental

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5. See, e.g., Maahsen v. Rudderow, No. C-4762-81 (N.J. Super. Ct., Chan. Div. 1983) involving the Public Advocate as party intervenor.

6. In addition to the cases already mentioned, the Department has participated before this Court as amicus in a number of other cases. See, e.g., United Building and

(footnote cont'd on next page)

aspects of special education analysis which have not as yet been addressed by the parties before the Court: (1) the Congressional intent to require that related services such as CIC be provided so that handicapped children could be educated in the regular educational environment, particularly as it relates to (2) the considerable societal and individual benefits of mainstreaming children with disabilities into regular classrooms, and the fact that prior to the enactment of the Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq., many obstacles barred implementation of this concept.

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6. (cont'd from page 4) Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, __ U.S. __, 52 U.S.L.W. 4187 (February 21, 1984); Silkwood v. The Kerr-McGee Corp., __ U.S. __, 52 U.S.L.W. 4043 (January 11, 1984); Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1974).

For the above reasons, the Department respectfully requests leave to file the attached brief amicus curiae in this case.

Respectfully submitted,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE OF THE STATE OF NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The New Jersey Department of the Public Advocate was created in 1974 as an independent and unique cabinet-level agency of New Jersey state government to provide legal representation and other advocacy services affecting the public interest. N.J.S.A. 52:27E-29. 1/ The Department, through its Division of Advocacy for the Developmentally Disabled (hereinafter DADD) is vested with the responsibility to protect and advocate the rights of developmentally disabled and other handicapped persons in New Jersey. In addition, by designation of the Governor, the Department has the responsibility to protect and advocate for the rights of developmentally

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1. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws, and other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27E-30.

disabled persons pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 et seq.

To this end, the Department has, inter alia, participated in various proceedings involving the rights of the developmentally disabled relating to special education, 2/ medical treatment, 3/ and community

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2. The Department, through DADD, has assisted nearly 1000 children in obtaining appropriate educational services under the federal Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq. In 1983, the Division represented 217 children in such matters. Among those currently in litigation are East Windsor Bd. of Ed. v. Diamond, No. 83-2364 (D. N.J. 1983) and Wall Twp. Bd. of Ed. v. Watts, No. 83-4972 (D. N.J. 1983). See also, Bd. of Ed. of City of Paterson v. City Council of Paterson, No. L-03814-81 (N.J. Super. Ct., Law Div. 1982) wherein the Public Advocate participated in enforcing a city's financial obligation under the thorough and efficient education clause of the State Constitution.

3. DADD joined in an amicus brief before this Court in Pennhurst State School v. Halderman, 451 U.S. 1 (1981). See also, the Public Advocate's participation as party intervenor In the Matter of Claire C. Conroy, 188 N.J. Super. 523 (Chan. Div. 1983), rev'd 190 N.J. Super. 453 (App. Div. 1983), cert. granted (footnote cont'd on next page)

residences. 4/ The important role of the Department as a representative of the public interest has been frequently acknowledged. 5/

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3. (cont'd from page 3) __ N.J. __ (1983) involving the removal of a nasogastric tube of an 84-year-old woman suffering from organic brain syndrome and In the Matter of Lee Ann Grady, 85 N.J. 235, 426 A. 2d 467 (1981) involving the sterilization of a mentally retarded individual, and as amicus curiae in State of N.J. v. Levine, 84 N.J. 234, 418 A. 2d 229 (1980).

4. See Maahsen v. Rudderow, No. C-4762-81 (N.J. Super. Ct., Chan. Div. 1983) where the Public Advocate was granted leave to participate as party intervenor in a case involving the right of developmentally disabled persons to establish community residences based upon federal and state policy that services to persons with developmental disabilities should be provided in the least restrictive environment consistent with the respective needs of those individuals.

5. Recently, for example, the Supreme Court of the State of New Jersey characterized the Department as a "shining example of that commitment [by the government to the public interest]", Mt. Laurel Twp. v. Dept. of the Public Advocate, 83 N.J. 522, 535, 416 A. 2d 886, 893 (1980), and of "admirably further-[ing] the principles embodied in our Constitution", id. at 536, 416 A. 2d at 893, as it fulfills the role of "nourishing and revitalizing our political system", id. The Department has participated before the Court (foootnote cont'd on next page)

Generally, this case presents the question of whether handicapped children are entitled to clean intermittent catheterization (CIC) as a related service, within the meaning of the Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq. (hereinafter EAHCA), necessary to assist them in benefitting from special education, and whether the provision of CIC by a school district is otherwise mandated pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which bars discrimination against handicapped persons in federally funded programs. The interest of the Department in this case arises from its frequent experience

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5. (cont'd from page 4) as amicus curiae in several cases other than those already mentioned. See, e.g., United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, __ U.S. __, 52 U.S.L.W. 4187 (February 21, 1984); Silkwood v. The Kerr-McGee Corp., __ U.S. __, 52 U.S.L.W. 4043 (January 11, 1984); Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1974).

with special education and other issues affecting the developmentally disabled citizens of the State of New Jersey and the obligation of the Department pursuant to its federal and state mandate to further and protect the rights of the developmentally disabled in this State, including the right to a free, appropriate public education. Respondent Amber Tatro and many of the other handicapped children who stand to be affected by the outcome of this case are developmentally disabled. 42 U.S.C. §6001 (7); N.J.S.A. 52:27E-44.3; N.J.S.A. 30:6D-3.

The Department appears as amicus curiae to address several fundamental aspects of special education analyses: (1) the Congressional intent to require that related services such as CIC be provided so that handicapped children could be educated in the regular educational environment, and (2) the considerable societal and individual benefits

of mainstreaming children with disabilities into regular classrooms, and the fact that prior to the enactment of EAHCA, many obstacles barred implementation of this concept.

STATEMENT OF THE CASE

Respondent Amber Tatro (hereinafter Amber) is a child affected by myelo-meningocele, commonly known as spina bifida, which, among other things, necessitates that a procedure known as clean intermittent catheterization (CIC) be administered to her once every three or four hours. Tatro v. State of Texas, 481 F. Supp. 1224, 1226 (N.D. Tex. 1979) (hereinafter Tatro I).

In 1979, Amber's parents requested from petitioner an appropriate special education program for Amber, who has orthopedic and speech impairments in addition to the neurogenic bladder condition which makes CIC

necessary. Tatro v. State of Texas, 516 F. Supp. 968, 971 (N.D. Tex. 1981) (hereinafter Tatro II). The school district agreed to place Amber, who was then three years old, in its Early Childhood Development Classes but would not agree to provide her with CIC during the school day. Id. Subsequent administrative hearings initiated by the Tatros resulted in determinations by both a hearing officer and the State Commissioner of Education that petitioner was required to provide CIC. Id. These determinations, however, were reversed by the State Board of Education. Id.

Subsequently, Amber's parents, respondents Henri and Mary Tatro, filed pursuant to 20 U.S.C. §1415 an action in the United States District Court for the Northern District of Texas seeking injunctive relief and damages. The District Court denied the Tatro's motion for a preliminary injunction.

Tatro I, supra. On appeal, the United States Court of Appeals for the Fifth Circuit considered the application of the Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq., to the facts of the case, and held that "without the provision of CIC, Amber cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all." Tatro v. State of Texas, 625 F. 2d 557, 562 (5th Cir. 1980). The Court thus held that EAHCA "must be read literally to include the provision of CIC to Amber Tatro," id. at 564 (footnote omitted), and also held that respondent's failure to provide CIC violated section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Id. at 564-65. The case was accordingly remanded to the District Court. Id. at 565.

On remand, the District Court rejected the school district's argument that CIC was a

medical service which, under 20 U.S.C. §1401 (17), the school system was not required to provide. Tatro II, supra, 516 F. Supp. at 975-77. The Court ordered the school district to modify Amber's individualized education plan (hereinafter IEP) to provide for CIC. Id. at 977.

On appeal of Tatro II, the Fifth Circuit, guided by its reading of EAHCA's related services provision in Tatro I, upheld the District Court's determination that CIC is not medical treatment within the meaning of 20 U.S.C. §1401 (17). Tatro v. Texas, 703 F. 2d 823, 827-29 (5th Cir. 1983). The Court also rejected the school district's argument that provision of home instruction to Amber would comply with the requirement of EAHCA that a free, appropriate public education be provided. The Court noted that Amber's IEP (jointly developed by respondents and petitioner) provided for instruction at

school, not at home, and must be followed unless circumstances warranted its modification. Id. at 830-31. The Court therefore affirmed the judgment of the District Court in Tatro II.

The school district applied to the Fifth Circuit for a rehearing en banc. That request was denied, and the district then petitioned this Court for a Writ of Certiorari, which was granted on December 5, 1983.

SUMMARY OF ARGUMENT

The Education for All Handicapped Children Act requires that handicapped children be educated in classes with nonhandicapped children, except when instruction "in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412 (5). In the present case, the individualized education plan, prepared jointly by the school

district and the parents, provides for the child's attendance in a regular second grade class. Since Amber cannot attend that class without CIC, it is a supplementary aid or service which §1412 (5) indicates Congress intended be provided.

Congressional intent to require the process discussed above of "mainstreaming" handicapped children into classes with nonhandicapped children by providing necessary supplemental services is demonstrated by extensive discussion in EAHCA's legislative history. The Congressional focus on providing services necessary to permit attendance in classes with nonhandicapped children is also demonstrated by the inclusion in EAHCA of various ancillary provisions favoring mainstreaming, particularly several which relate not to direct educational services but only to access. These include the requirement that handicapped children be transported to

school, 20 U.S.C. §1401 (17), and provisions for making school buildings physically accessible to children with disabilities, 20 U.S.C. §1406.

At the time EAHCA was enacted, the many benefits of mainstreaming had long been recognized by the education profession but had not been implemented due to prejudice, inertia, and bureaucratic difficulties. These benefits include more positive attitudes of handicapped and nonhandicapped pupils toward one another, more positive self-images on the part of handicapped children, and greater educational achievement by children with disabilities. The effect of EAHCA was to overcome historical obstacles to mainstreaming and make possible the realization of its economic and educational benefits.

LEGAL ARGUMENT

POINT I

THE DECISION BELOW AFFIRMS THE CONGRESSIONAL PURPOSE OF PROVIDING RELATED SERVICES TO ENABLE HANDICAPPED CHILDREN TO BE EDUCATED IN THE REGULAR EDUCATIONAL ENVIRONMENT WHENEVER FEASIBLE.

A. Petitioner School District Acknowledged in the Child's Individualized Education Plan That It Is Educationally Feasible for Her to Attend Regular Classes.

To insure that the mandate of the Education for the Handicapped Act requiring the provision of a free appropriate public education to handicapped children would be fulfilled, Congress relied heavily upon certain procedural requirements including development of an individualized education plan (IEP). Rowley v. Board of Education, 458

U.S. 176, 189 (1982). Among other things, the IEP must include a "statement . . . of the extent to which such child will be able to participate in regular educational programs." 20 U.S.C. §1401 (19)(C). Thus, the IEP must specify how the child's school district intends to meet the requirement that "special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412 (5) (emphasis supplied).

In the case at bar, the result of this process has been a determination that respondent's placement in one of the school district's regular second grade classes would meet this requirement, as well as others necessary to provide her with the free appropriate public education mandated by the

Act. 6/ More specifically, the IEP provides for Amber to attend the regular second grade class for the bulk of each school day with approximately one hour in a resource room for special help.

The petitioner school district was, as required by the statutory scheme, one of the parties which agreed to that determination. See 20 U.S.C. §1401 (19). In fact, it was the school district's own staff which developed the IEP. The petitioner was aware at that time of Amber's need for clean intermittent catheterization (CIC) and did not view it as preventing her education in a regular class. See Tatro II, 516 F. Supp. at 971-72. 7/ Events have proved that view correct, as Amber successfully attended a regular first grade class and now attends a regular second grade

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6. The individualized education plan for respondent which reflects this determination is reproduced in respondent's appendix.

7. Petitioner did, of course, dispute whether the CIC was to be provided by it.

class. See Brief of Respondent at 1-2 n.2. Accordingly, there is no question that Amber can be educated in a regular class. Under the provisions of 20 U.S.C. §1412 (5), supra, she cannot be removed from that class without contravening the intent of Congress. As this Court held in Rowley, "[t]he Act requires participating states to educate handicapped children with nonhandicapped children whenever possible," 458 U.S. at 202, meaning in all cases except when "education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Id. n.24, quoting 20 U.S.C. §1412 (5). As will be shown below, Congress intended that the States and local school districts provide incidental services when necessary to permit attendance in regular classes. In this case, the mutually agreed upon IEP requires that Amber be educated in a regular classroom. Since this cannot be accomplished without CIC, that service falls squarely within the

Congressional mandate.

B. Congress Required That States and Local School Districts Provide Incidental Services to Handicapped Children to Assure Them the Benefits of "Mainstreaming" into Regular Classes.

As noted above, section 612 (5) of EAHCA, 8/ 20 U.S.C. §1412 (5), requires states receiving funds under that Act to assure that "removal of handicapped children from the regular educational environment occurs only when the nature and severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." This provision reflects a Congressional

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8. This brief follows the usage of the decision below which employs the term EAHCA as a generic reference to special education statutes codified at 20 U.S.C. §1401 et seq. See Tatro v. Texas, 703 F. 2d 823, 825. Strictly speaking, however, EAHCA refers to the 1975 amendment to those provisions. See, Education for All Handicapped Children Act of 1975, Pub. L. 94-142, §1, 9 Stat. 775 (1975).

concern that handicapped children attend classes with nonhandicapped children except when educationally not feasible. As the Senate Report on the bill which became Pub. L. 94-142 -- the 1975 amendments to EAHCA -- reiterates:

> The Education Amendments of 1974 added important new provisions to the Education of the Handicapped Act which require the States to establish procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped; and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

S. Rep. No. 168, 94th Cong., 1st Sess. 8 reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1432 (emphasis added).

The legislative history of EAHCA is, in fact, pervaded by specific expressions of the intent that, absent clear educational reasons to the contrary, handicapped children attend regular classrooms. These references occur in the Committee reports of both houses. H.R. Rep. No. 332, 94th Cong., 1st Sess. 9, 15; S. Rep. No. 168, 94th Cong., 1st Sess. 48, reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1501 (among rights to be protected is right of "every handicapped child [to be] educated in the least restrictive environment"); H.R. Rep. No. 664, 94th Cong., 1st Sess. 30 (1975); and S. Rep. No. 168, supra, at 8. They also occur throughout the floor debate in both houses. 121 Cong. Rec. 19485 (1975); 121 Cong. Rec. 25540 (1975); 121 Cong. Rec. 23706 (1975); and 121 Cong. Rec. 19484 (1975).

These expressions of Congressional purpose not only make clear the intent that handicapped children attend regular classes,

but also that special services be provided when necessary to accomplish that goal. Thus, the House Conference Report notes that "to the maximum extent appropriate handicapped children must be educated with children who are not handicapped, and that handicapped children should be placed in special classes, separate schooling, or any other educational environment only when the nature and severity of the handicap is such that education in regular classes with the use of supplementary aids and suportive services cannot be achieved satisfactorily." H.R. Rep. No. 664, 94th Cong., 1st Sess. 30 (1975). Accord, S. Rep. No. 168, 94th Cong., 1st Sess. 8, 47 (1975). Moreover, the House Conference Report further notes that one requirement of the House bill would place a mandate on local school districts for the "provision of special services to enable handicapped children to participate in regular educational programs." Id. at 42; accord, H.R. Rep. No. 332, 94th

Cong., 1st Sess. 17 (1975) (one prerequisite to local funding allocation is assurance that special education be provided to all handicapped children in "least restrictive" educational setting). This provision was incorporated into the final statute without significant change. See id. at 44; 20 U.S.C. §1414 (a)(1)(C)(iv).

If the requirement that local school districts provide special services for the purpose of enabling handicapped children to participate in regular education programs means anything, it must mean that a service as quick, simple, and nondisruptive as CIC is to be provided. 9/ Unlike CIC, many of the

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9. The Court of Appeals described the procedure as follows:

> CIC is a very simple procedure which can be performed within five minutes. The catheter is washed with soap and water; the urethral area is wiped clean; the catheter is introduced approximately one and one-half inches into the urethra and the bladder contents drained; the

(footnote cont'd on next page)

other services which have clearly been mandated by Congress, see 20 U.S.C. §1401 (17), may require elaborate equipment (e.g., physical therapy 10/) or highly trained personnel (e.g., occupational and speech therapy).

Perhaps most significant, however, is the specific Congressional mandate that transportation be provided as a related service. Id. Unlike therapy services, the sole function of transportation is to enable the child to attend school. Thus, even if the value of CIC as self-care education is

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9. (cont'd from page 20) catheter is withdrawn; and the amount of urine collected is measured and noted. Tatro v. Texas, 625 F. 2d 557, 559 n.3 (5th Cir. 1980).

10. See, e.g., E. Snell, "Physical Therapy" in W. M. Cruickshank, ed., Cerebral Palsy: A Developmental Disability 335 (3d rev. ed. 1976); R. Shestack, Handbook of Physical Therapy, 196 (3d ed. 1977); J. Griffin & T. Karselis, Physical Agents for Physical Therapists, 2d ed. (1982).

completely discounted, it is -- like transportation -- a service which is clearly within the Congressional intent that services necessary to enable handicapped children to attend regular educational programs be provided.

Thus, the legislative history demonstrates a Congressional commitment to educating handicapped children in regular classes whenever that could be made possible by providing related or supplemental services. The Congressional concern with this issue was based not only upon recognition of the increased effectiveness of education in a regular class, see pp. 37-41, infra, but also upon a need for special efforts to overcome a history of exclusion of handicapped children from regular classes (and sometimes from all classes). The Senate Committee Report noted that identification of a person as having a disability "has too often meant separation, discriminatory treatment, and a reason for

failing to provide any services at all." S. Rep. No. 168, 94th Cong., 1st Sess. 27 reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1451. 11/ Thus, the Congressional concern was as much with insuring placement in regular classes whenever possible as with preventing total exclusion from educational services.

As a reflection of the importance which Congress attached to "mainstreaming" handicapped children into regular classes, EAHCA includes several ancillary provisions designed to foster accomplishment of that

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11. Similarly, in discussing the precedent-setting cases of Pennsylvania Assoc. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and Mills v. Bd. of Education of the District of Columbia, 348 F. Supp. 866 (D. D.C. 1972), the Committee quoted language from the court's order in Mills which prohibited exclusion "from a regular public school assignment" unless the child was provided with both "adequate alternative educational services" and "prior hearing and periodic review" of the educational program provided. Id. at 6, reprinted in 1975 U.S. Code Cong. & Ad. News at 1430 (emphasis added).

objective. For example, 20 U.S.C. §1406 authorizes federal grants to State or local educational agencies for the removal of architectural barriers which might prevent a physically disabled child from attending regular classes. See 121 Cong. Rec. 23706 (1975) (statement of Representative Perkins, Chairman of Committee on Education and Labor, noting that bill provided for "removal of architectural barriers so that children with handicapping conditions may attend the same schools which children without such handicaps may attend"). These grants would be in addition to the broader program of federal funding to accomplish the general purposes of the Act, set out at 20 U.S.C. §1411.

Thus, Congress not only provided for broad federal funding to enable States and localities to accomplish EAHCA's purposes, including provision of special services such as transportation to permit mainstreaming handicapped children into regular classes, but

also saw mainstreaming as of such importance that it provided funds for physical alteration of buildings when needed to accomplish that goal. Like transportation, removing architectural barriers is solely access related; it provides no direct educational service. Thus, the specific Congressional concern with removing physical barriers strongly reinforces its general concern with mainstreaming handicapped children into regular classes.

This concern with physical barriers finds a direct analogy in the facts of this case. While provision of a simple, routine service such as CIC is not comparable to making physical building renovations, they have similar effects on handicapped pupils' attendance in regular classes. As Senator Stafford, one of the primary sponsors of EAHCA and ranking minority member of the Subcommittee on the Handicapped, pointed out:

> For far too long handicapped children have been denied access to the regular school system because of an inability to climb the steps to the schoolhouse door, and not for any other reason. This has led to segregated classes for those children with physical handicaps. This is an isolation that is in many cases unnecessary. It is an isolation for the handicapped child and for the "normal" child as well. The sooner we are able to bring the two together, the more likely that the attitudes of each toward one another will change for the better.

121 Cong. Rec. 19484 (1975) (emphasis added). For Amber, the "inability to climb the steps to the schoolhouse door" is the unavailability of someone to provide CIC until she is old enough to do it herself.

Another ancillary provision of EAHCA which demonstrates the Congressional commitment to mainstreaming is found in 20 U.S.C. §1418 (b)(1)(C) which directs federal education officials to collect data "necessary for the implementation of this subchapter"

including the number of handicapped children participating in regular educational programs and the number who are attending programs other than the regular education environment. The pervasive concern with maximizing attendance of handicapped children in regular classes has appeared in a number of other contexts as well. With respect to early education programs, for example, the House Committee report concerning the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484 (1974), noted that programs for younger handicapped children have the effect not only of preventing secondary problems but also of "enhancing their ability to enter the educational mainstream." H.R. Rep. No. 380, 93rd Cong., 2nd Sess. reprinted in 1974 U.S. Code Cong. & Ad. News 4141. The mainstreaming issue was also addressed in the context of a provision to allow state agencies under certain circumstances to provide education to handicapped children, including services in

State and regional centers (see 20 U.S.C. §1414 (d)). In fact, it was the only issue which the House Conference Report raised in connection with that provision:

> With respect to the provision allowing the State educational agency, under specified conditions, to use the local educational agency allotment to serve handicapped children directly in such manner and at such location (including State and regional centers) consistent with the provisions of the Act, conferees specifically point out that serving children in State or regional centers must be done consistent with provisions of existing law which require that to the maximum extent appropriate, handicapped children are educated with nonhandicapped children, and special classes, separate schooling, or other removal from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

H.R. Rep. No. 664, 94th Cong., 1st Sess. 45 (1975) (emphasis added).

In short, the Congressional intent that

handicapped children be "mainstreamed" into regular classrooms appears not only in the general mandate of 20 U.S.C. §1412 (5) (requiring States receiving assistance under EAHCA to assure that handicapped children attend the regular educational environment except when education in such classes with the use of supplementary services cannot be achieved satisfactorily), but also in a wide range of more specific contexts. These repeated references clearly demonstrate that provision of supplementary aids and services to enable handicapped children to attend regular classes was a major Congressional concern in the enactment of EAHCA.

This does not mean that Congress intended to require that a school district provide every service needed by a handicapped child. The Congressional concern focuses on services which are appropriate to enable the child to benefit from special education, Rowley v. Bd. of Education, supra, 458 U.S. at

189, or to facilitate attendance in the least restrictive, appropriate educational program as determined in the mutually agreed-upon IEP.

Thus, if it were not necessary for Amber to receive CIC during the school day, CIC would not be required to enable her to benefit from special education and therefore would not be a related service under 20 U.S.C. §1401 (17); nor under such circumstances would it be a supplementary aid or service necessary under 20 U.S.C. §1412 (5) to prevent her exclusion from the regular educational environment. In addition, if CIC were a complicated medical procedure rather than a simple task, requiring only a clean metal tube (see 516 F. Supp. at 970 n.1), and easily learned in less than one hour (516 F. Supp. at 974) and which Amber will soon be able to perform on her own (id.), it would similarly be excluded as a related service. 20 U.S.C. §1401 (17). Such services as kidney dialysis are clearly distinguishable from CIC on either

of the foregoing bases. 12/

In short, the clearly expressed Congressional intent to require that services such as CIC be provided to enable handicapped children to attend regular classes can be satisfied without undue expense to local school districts. 13/ In enacting the

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12. CIC is clearly much closer to diapering than it is to dialysis. In this amicus' State, the State education agency mandates that programs for educationally handicapped preschool children include a "diapering area as needed in the classroom with facilities for the sanitary disposal of soiled diapers." 15 N.J.R. 747 (1983), to be codified at N.J.A.C. 6:28-2.3(a)(3).

13. In a telephone survey conducted under the supervision of Professor Herbert Semmel of the Yeshiva University Cardozo School of Law, the state boards of education in every state were asked whether CIC was considered to be a "related service" in their state. Thirteen states responded, all in the affirmative, indicating that there is a general policy nationally of recognizing CIC to be a service provided by the public schools when necessary for a handicapped child to benefit from special education. The staff who responded to the survey were:

Arizona - Shirley Bowman, Education Program Specialist for the Federal Projects
California - Bob Evans, Consultant, Special Education and Assistant to the Director

(footnote cont'd on next page)

requirement that handicapped children be "mainstreamed" into regular classes, Congress was motivated by the considerable benefits of placing children with disabilities into regular classrooms:

> I firmly believe that if we are to teach all of our

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13. (cont'd from page 33)
of Special Education
Florida - Dr. Wendy Cullar, Director of Exceptional Students
New Hampshire - Robert Kennedy, Director of Special Education Section
Kentucky - Lynette Uhl, Director of Unit of Procedural Safeguards
Illinois - Betty Endicott, Special Education Specialist
Minnesota - Marilyn Sorenson, Education Specialist
Mississippi - Carolyn McGuire, Assistant Program Supervisor, Special Ed Section
Montana - Gail Gray, Director of Special Education
New Jersey - Mari Molenaar, Planning Associate, Division of Special Education
North Carolina - Beverly Gardner, Secretary of Related Services
North Dakota - Shelby Niebergall, Assistant Director of Special Education
Oklahoma - Glenn Haring, Assistant Officer for Procedural Safeguards, Special Education Section
Wisconsin - Dr. Betty Ross-Thompson, Supervisor of Special Physical and Other Health Impairments, Department of Education

> children to love and understand each other, we must give them every opportunity to see what "different" children are like.
>
> If we allow and, indeed, encourage handicapped children and nonhandicapped children to be educated together as early as possible, their attitudes toward each other in later life will not be such obstacles to overcome. A child who goes to school everyday with another child who is confined to a wheelchair will understand far better in later life the limitations and abilities of such an individual when he or she is asked to work with, or is in a position to hire, such an individual.

121 Cong. Rec. 19484 (1975) (remarks of Senator Stafford).

> . . . Failure to provide appropriate educational services for all handicapped children results in public agencies and taxpayers spending billions of dollars over the lifetime of these individuals to maintain them as dependents in minimally acceptable lifestyles. Yet, providing appropriate educational services now means that many of these indivi-

> duals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds. The time, I hope, has come when we look no longer upon persons with disabilities as charitable objects, unable to make significant contributions. Action on this legislation will establish a public policy which will break the chain of ignorance once and for all.

121 Cong. Rec. 19492 (1975) (remarks of Senator Williams).

In short, mainstreaming provides extensive societal and individual benefits, which Congress determined, more than justify the comparatively small incremental expense of providing access to regular education classes. These benefits will be discussed in greater detail in Point II of this brief.

POINT II

ALTHOUGH THE BENEFITS OF MAINSTREAMING HANDICAPPED CHILDREN HAVE LONG BEEN RECOGNIZED, UNTIL THE ENACTMENT OF EAHCA MANY OBSTACLES BARRED IMPLEMENTATION OF THIS CONCEPT.

A. Benefits of Mainstreaming

As discussed in Point I, supra, mainstreaming is the principle that, to the maximum extent possible, handicapped children and nonhandicapped children should be educated together. The legal and moral underpinnings of mainstreaming may be traced to traditional notions of equality and fairness as expressed by this Court in a different but related context in Brown v. Bd. of Educ., 347 U.S. 483 (1954), and related cases. See generally, Haggerty & Sacks, "Education of the Handicapped: Towards a Definition of an Appropriate Education", 50 Temp. L. Q. 961, 962-63 (1977) (hereinafter Towards a Definition of an Appropriate Education). On a

different level, mainstreaming can be supported by the significant educational and social benefits it provides to handicapped children. These benefits include higher academic achievement and greater mastery of the social skills necessary for success in later life. In addition, mainstreaming can lead to a more positive attitude toward handicapped people on the part of nonhandicapped pupils, teachers and parents, and heightened expectations about their potential for learning and working.

When handicapped children are deprived of the opportunity to interact with their nonhandicapped peers, they have greater difficulty mastering effective communication skills, developing appropriate sexual behavior, and properly channeling their aggressive feelings. This is so because peer relationships are of primary importance in acquiring these and the other skills considered a part of normal childhood

development. See, e.g., Hartup, "Peer Interaction and the Process of Socialization", in Guralnick, ed., Early Intervention & the Integration of Handicapped and Nonhandicapped Children 27, 28 (1978) (hereinafter Early Intervention); Nordquist, "A Behavioral Approach to the Analyses of Peer Intervention", in Early Intervention at 53.

Children learn by imitating others and tend to imitate those who perform most effectively within their peer group. Bricker, "A Rationale for the Integration of Handicapped and Nonhandicapped Preschool Children", (hereinafter Bricker) in Early Intervention 3, 18-19. Thus, when separated from nonhandicapped children, handicapped pupils are deprived of effective role models, and their social and educational achievement is lower.

Peer expectations also perform an important role in determining educational and social achievement. Nonhandicapped peers tend

to encourage more "normal" behavior from handicapped pupils than other handicapped peers do in sheltered settings. Similarly, teachers of handicapped pupils in integrated settings tend to have higher expectations than teachers in sheltered settings and, thus, expect and receive more from their students. Id. at 18. Mainstreaming also tends to improve the handicapped pupil's self-image and reduces feelings of inferiority. The expectations of parents of such pupils are also increased as they see their children progress and become accepted by nonhandicapped pupils. Id. at 5-7.

Given more self-confidence, mastery of a greater array of social skills, and higher teacher and peer expectations, it is not surprising that handicapped pupils in mainstreamed settings do better academically than their counterparts in sheltered classrooms. See, e.g., Ziegler, "Integration of Young, Trainable, Mentally Retarded

Children into Regular Elementary School", 42 Exceptional Children 184 (1976); Guralnick, "The Value of Integrating Handicapped and Nonhandicapped Preschool Children," 46 Am. J. Orthopsych. 236, 237 (1976); Ruhl, "Mainstreaming", in Schmid & Nagata, eds., Contemporary Issues in Special Education 2, 11-19 (1983). Thus, mainstreamed children on the whole seem better equipped to live independently and to be economically self-sufficient as adults than their counterparts in sheltered settings. 14/

B. History of Mainstreaming

The notion of mainstreaming did not begin with the enactment of EAHCA in 1975 or

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14. Ruhl summarizes much of the research concerning the benefits of mainstreaming. Whether severely handicapped children, especially those with significant emotional disturbances or intellectual impairments, can or should be mainstreamed is the subject of professional debate. Id. at 2. However, situations like those of Amber Tatro -- where intelligence is unimpaired and the orthopedic problems can be reasonably accommodated -- are far different from the cases which are the subject of that debate.

with the court cases preceding it in the early 1970s. See, e.g., Pennsylvania Assoc. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.C. Pa. 1971) and Mills v. Bd. of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972). Mainstreaming was a widely accepted principle of special education long before these developments. As early as 1903, some school districts had already established policies favoring placement of mentally retarded children in regular classrooms. Scheerenberger, A History of Mental Retardation 167 (1983). By the 1930s, acceptance of the concept had grown significantly. Said one commentator:

> The modern school aims to provide an environment conducive to the complete development of every child's potential . . . . Such a philosophy has significant implications for special education. The exceptional child is not apart from the school program, but merely a child who may need . . . an educational program adopted

to his individual needs.

* * *

> "As nearly normal as possible", has been suggested as the slogan for education of the exceptional child.

Hefferman, "Meeting the Needs of Exceptional Children in Rural Schools", 2 J. Exceptional Children 49 (1935); see also, Berry, "The Exceptional Child in Regular Classes", 3 J. Exceptional Children 15 (1936) (asserting that the majority of handicapped children can be educated in regular classes).

During the 1940s and 1950s, support for mainstreaming grew rapidly. See, e.g., Challman, "Mental Health in Special Classes", 8 J. Exceptional Children 42, 44 (1941) (pointing to stigmatization, trauma, and other hazards associated with special classes); Tenny, "Adjustment of Special Class Pupils to Regular Classes", 10 J. Exceptional Children 139 (1944) (exceptional children can be prepared for citizenship in a normal community

through education in regular school); Robb, "Segregation versus Nonsegregation of Exceptional Children", 12 J. Exceptional Children 235 (1946) (benefits of social interaction); Tenny, "The Minority Status of the Handicapped", 20 Exceptional Children 260, 264 (1953) (segregation of the handicapped has prevented social contact with nonhandicapped children both in and out of school); Dewey, "Social Status of Physically Handicapped Children", 23 Exceptional Children 104, 132 (1956) (benefits of maximizing social interaction).

By 1962 mainstreaming had gained such widespread acceptance among educators that it could be reported:

> The prevailing view is that normal home and school life should be preserved if at all possible. When a special placement is necessary to provide suitable care or education, it should be no more "special" than necessary.

Reynolds, "A Framework for Considering Some

Issues in Special Education", 28 Exceptional Children 367, 368 (1962); see also, Deno, "Special Education as Developmental Capital", 37 Exceptional Children 229, 234-35 (1970). Studies undertaken during the 1960s and early 1970s demonstrated the superior performance of handicapped children in regular classrooms when compared to children in special classes. Voekler, "Organization, Administration, and Supervision of Special Education Programs", in Cruickshank & Johnson, eds., Education of Exceptional Children and Youth 659, 659-60 (3d ed. 1975).

Mainstreaming was not only viewed as a means to improve performance; many recognized that segregated programs were detrimental to the interests of handicapped pupils. In a landmark article on mainstreaming mentally retarded children, Dunn asserted that a "better education than special class placement is needed for [handicapped children] . . . ." He admonished educators not to "ignore the

evidence that removing a handicapped child from regular grades for special education probably contributes significantly to his feelings of inferiority and problems of acceptance." "Special Education for the Mildly Retarded -- Is Much of It Justifiable?", 35 Exceptional Children 5, 9 (1968).

The attitude of the education community toward mainstreaming at the time Congress was considering adopting the EAHCA is captured in this statement of the Council for Exceptional Children, perhaps the foremost national professional organization dedicated to promoting effective services for handicapped children:

> [E]ducation within the mainstream can provide the optimal opportunity for many exceptional children. Consequently, the system for the delivery of special education must enable the incorporation of special help and opportunities for them in mainstream settings whenever such approach is feasible. Children should spend only as much time outside regular classroom settings

> as is necessary to control learning variables that are critical to the achievement of specified learning goals.

The Council for Exceptional Children, "The Organization and Administration of Special Education -- A CEC Policy Statement", 40 Exceptional Children 70 (1973); see also, The Council for Exceptional Children, "Definition of Mainstreaming", 43 Exceptional Children 43 (1976); see also, Malloy, "The Changing Mandate for Special Education", 40 The Education Digest 6 (1975); Martin, "Some Thoughts on Mainstreaming", 41 Exceptional Children 150 (1974); and Wolfenberger, Normalization 46 (1972).

Federal policies during the late 1960s and early 1970s mirrored the attitudes toward mainstreaming that prevailed among educators. The United States Department of Health, Education and Welfare reported that it can no longer be "automatically assumed that it is best to insulate [handicapped children] from

the world of normalcy in which they must eventually learn to operate. There is a growing feeling that isolating them from normal chilren may in many cases be more damaging than efficacious." Ford, "Project Helping Hand: Innovative Special Education Service for a Rural Area," in United States Department of Health, Education and Welfare, Innovations in Special Education 33 (1972).

The National Advisory Committee on Handicapped Children expressed its support for the pro mainstreaming policies of the federal Bureau of Education, encouraging that agency to "continue . . . stimulating the integration of handicapped children into regular educational settings . . .." Third Annual Report 19 (1970); accord 1974 Annual Report of the National Advisory Committee on the Handicapped, First Class Citizenship for Handicapped People 5-6 (1974). The Committee's 1973 report supported policies "directed towards the reduction of dependency

on the part of the handicapped child . . . and entry into regular education programs . . .." National Advisory Committee on Handicapped Children, Basic Education Rights for the Handicapped 6 (1973). The Committee went on to report "[t]here is every reason to believe that special education [in a majority of the states] is reexamining its reliance upon self-contained special classes . . . and moving toward increased reintegration in the regular classes." 15/ Id. at 9-10. In a similar view, the National Advisory Committee on the Handicapped admonished government agencies at all levels to strive to guarantee handicapped children the "[o]pportunity to

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15. The Department of Health, Education and Welfare reported to Congress in 1973 that every state education department had at least a plan to promote mainstreaming of handicapped students. Hearings on S. 896 and S. 6 before the Subcommittee on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93rd Cong., 1st Sess. 453 (1973) (Statement of Stephen Kurzman, Asst. Secretary for Legislation, U. S. Department of Health, Education and Welfare.

participate with nonhandicapped individuals in the least restrictive environment commensurate with the education needs." Full Educational Opportunity Under the Law (1975).

From the foregoing it is clear that mainstreaming was already a widely accepted principle of special Education at the time Congress enacted EAHCA in late 1975.

C. Historical Obstacles to Mainstreaming

Despite professional acceptance of mainstreaming in education, starting as early as the turn of the century, implementation lagged far behind theory for several reasons: (1) funding for special education was often inadequate and disproportionately low in comparison to funding for regular education; (2) education practices using separate classroom facilities established in earlier periods of public hostility toward handicapped people carried an inertia of their own; and (3) school administrators were frequently

unwilling to make the accommodations necessary to allow handicapped children to be educated in regular classroom settings.

These difficulties were in part a reflection of historical prejudice. At the turn of the 20th century, public attitudes toward handicapped people reflected a mixture of fear and ignorance. Pseudoscientific beliefs abounded which viewed many handicapped people as parasites unworthy to survive, and worse, as menaces to the healthy population because of their supposed abnormally strong and ungovernable sexual drives and uncontrollable predisposition toward crime. President's Committee on Mental Retardation, Mental Retardation Past and Present 9 (1977) (hereinafter President's Committee). Consequently, most handicapped children received little, if any, education.

As the century progressed, public attitudes improved and special education programs increased, but the majority of

classes were segregated, often in separate facilities. Enormous numbers of handicapped children were still denied an education altogether. Reynolds & Rosen, "Special Education: Past, Present & Future" reprinted in Special Learning Corp., Exceptional Children: A Reference Book 3 (1978) (hereinafter Past, Present and Future); see generally, Ruhl, supra at 4-5. Although overt public hostility toward the handicapped had lessened by this time, many citizens viewed spending money to educate handicapped children as wasteful. 16/ Past, Present and Future at 5.

The confluence of several factors in the late 1940s led to a major turning point. With the return of large numbers of disabled

16. Education was viewed as preparing children to become contributing members of society. Children were expected to stay in school only long enough to acquire the skills needed to become productive. Therefore, many people questioned educating handicapped children whom they believed would never become contributors to society. Id.

veterans from World War II and, later, from the Korean conflict, the public became more sensitive to the plight of handicapped people generally. Sympathetic public attitudes were reinforced by medical research which revealed that the causes of many birth defects were not genetic but resulted from intrauterine and birth accidents. (For example, rubella during the first trimester of pregnancy and the overexposure of premature infants to oxygen were found to be major cause of blindness, mental retardation, and multiple handicapping conditions.) Id. at 6. And finally, parents, dissatisfied with the services available for their handicapped children, organized, forming numerous state and national organizations dedicated to changing governmental policies. President's Committee, supra, at 37-61.

Not surprisingly, special education enrollment increased dramatically after World War II -- with a 700% increase enrollment

recorded nationally between 1945 and 1970. Ruhl, supra at 5. However, programs for handicapped children continued to be separated and were still often inferior to education programs for nonhandicapped children. Handicapped students frequently confronted long waiting lists for the available services. Towards a Definition of an Appropriate Education, supra at 962.

Mainstreaming efforts were often frustrated by school officials who refused to accept handicapped pupils because facilities were not accessible or because the children were not toilet trained. Abelson, "Measuring Preschool's Readiness to Mainstream Handicapped Children", 55 Child Welfare 216, 218 (1976). Many of the ancillary services necessary to support children in a mainstreamed environment, such as physical therapy, speech therapy, and transportation were not available. Keogh, "What Research Tells Us About Mainstreaming", in O'Donnell

and Bradfield, eds., Mainstreaming: Controversy and Consensus 33-34 (1976); Cantrell & Cantrell, "Preventive Mainstreaming: Impact of a Support Services Program on Pupils", 42 Exceptional Children 137 (1976). Funding formulas based on self-contained units posed major obstacles to the establishment of the more flexible options necessary to mainstream handicapped children. Weintraub and Abelson, "Appropriate Education for All Handicapped Children: A Growing Issue", 23 Syracuse L. Rev. 1037, 1042 (1972).

Congress, in enacting the EAHCA, found that more than one-half of the handicapped children in this country were not receiving an appropriate education and that one million handicapped children were excluded from the public school system entirely. 20 U.S.C. §1400 (b)(4) and (6); Rowley v. Bd. of Education, 458 U.S. 176 (1982). To correct these major shortcomings in public education and to facilitate mainstreaming, Congress

mandated, as discussed in Point I, supra, that to the maximum extent feasible all handicapped children receive an education with nonhandicapped children and that they be excluded from regular classrooms only when education in such classrooms cannot be achieved satisfactorily even with the use of supplemental aids and services. 20 U.S.C. §1412 (5).

The impact of EAHCA was positive and immediate. A report by the National Education Association summarized the progress:

> There were many criticisms of the quality of educational programs for handicapped children, but even the harshest criticism was tempered by the acknowledgement of striking improvements in those programs since the enactment of P.L. 94-142. Significant changes were beginning to occur in the attitude of students, with handicapped children seeming to become more self-reliant as they moved out of sheltered environments, and nonhandicapped children becoming more accepting of handicapped children and understanding the ways in which their handicapped

classmates are different.

National Education Association, A Study Report: Education for All Handicapped Children: Consensus, Conflict, and Challenge, (1978); see generally, U.S. Dept. of Health, Education and Welfare, Progress Toward a Free Appropriate Education, A Report to Congress on the Implementation of 94-142, The Education for All Handicapped Children Act (1979).

D. Economic Benefits of Mainstreaming

From strictly an economic point of view, mainstreaming makes sense. The more restrictive and segregated programs are, the more they cost. Linder, Early Childhood Special Education 9 (1983). Mainstreaming makes use of available classrooms and facilities and reduces the need for separate, duplicate education programs. Bricker, supra at 9.

A Rand Corporation study commissioned by the United States Department of Education,

using 1977-78 cost data, demonstrated the economic advantages of mainstreaming. Rand surveyed 14 states, including Texas, and found that on an average, education in a regular classroom setting cost $901 per pupil. An education in a partially mainstreamed class ranged on average between $4345 and $4709; education in a separate classroom setting averaged $5352 per pupil. Kakalik, et al., The Cost of Special Education 37 (1981); Rand also found that the average cost of the related services for handicapped children was only $130 per pupil more than the cost of related services for nonhandicapped children. 17/ Id. at 19-20.

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17. The costs were $191 and $61 for handicapped and nonhandicapped pupils respectively. Related services for nonhandicapped students included nursing services, career counseling, and other similar services. Id. See also, National School Boards Association, A Survey of Special Education Costs in Local School Districts 26-27 (1979) (out of district nonresidential placements double the cost of educating handicapped pupils; residential placements quadruple the costs).

While Rand was careful to point out that these costs were averages and that individual variations occur with the type of condition, its severity, the age of the child, and the density of the handicapped child in a given district, id. at 38, it appears that in general an investment in related services is cost effective when it enables the child to attend a regular classroom, thereby eliminating the need for a substantially more costly separate program.

Amber Tatro's case illustrates this point. If Amber's parents could not afford to send a babysitter to school to perform CIC, as they do now, and could not travel to school themselves, Amber would have to be educated at home or in a special program where CIC was routinely available with the district billing the parents for CIC. If she remained at home, the district would be required to pay a tutor and physical therapist to provide her with education and related services. 20 U.S.C.

education and related services. 20 U.S.C. §1412. If Amber were placed in a special facility, the district would be required to pay this tuition (less the cost of CIC). Id. Either of these arrangements presumably would be significantly more costly to the district than paying for CIC to permit regular classroom instruction.

E. Other Considerations

It is important to emphasize that mainstreaming does not require that handicapped and nonhandicapped children be placed together indiscriminately, regardless of their individual needs. Regular classroom placement is appropriate only when the educational needs of the child can be satisfactorily met in such a setting with, if necessary, the use of supplementary aids and services. Guralnick, "Integrated Preschools as Educational and Therapeutic Environments", 115, 117 in Early Intervention; Past, Present and Future, supra at 7; 20 U.S.C. §1412 (2).

As discussed in Point I, supra, the IEP prepared for Amber Tatro by petitioner school district recognizes that placement in a regular classroom is both educationally appropriate and feasible. CIC is ancillary to Amber's educational needs, but necessary for her to attend class with her nonhandicapped peers. If this Court holds the school district is not required to provide CIC under these circumstances, then the future of mainstreaming will have been undermined, not only for Amber but for other handicapped children who need minor ancillary services in order to be educated in a regular classroom along with their nonhandicapped peers.

CONCLUSION

For the reasons stated, amicus respectfully submits that the decision of the Fifth Circuit, concluding that the school district was required to provide CIC to Amber Tatro, be affirmed.

Respectfully submitted,

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Counsel would like to express appreciation to Caren Winer, MSW, for her research assistance.

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